IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 5TH JUNE 2007 / 15TH JYAISHTA 1929

CRL.A.No. 552 of 2007()

SC.194/2006 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC-II), KOLLAM

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APPELLANT:

ANANDAN
C.NO. 1204,
CENTRAL PRISON
TRIVANDRUM

BY ADV. **SRI.K.K.RAJEEV (STATE BRIEF)**

RESPONDENTS:

STATE OF KERALA
REPRESENTED BY THE
PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 552 of 2007

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Dated: 05-06-2007

JUDGMENT

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant who was the sole accused in S.C. 194/0 on the file of the Addl. Sessions Court (Adhoc-II), Kollam challenges the conviction entered and the sentence passed against him by the said court for an offence punishable under Sec. 8(2) of the Abkari Act.

2. The case of the prosecution can be summarised as follows:

On 1-9-2003 at about 4 p.m. the accused was found standing on the bank of a canal running through Sreepuram Ela in east-west direction and pouring liquor from a 10 litre can into a glass tumbler held by another person and on seeing the police party both the persons made good their escape after abandoning the can as well as the glass tumbler. The can was found to contain 5 litres of illicit arrack. Since the accused was found in possession of 5 litres of illicit arrack, he has committed offences punishable under Sections 55 (a) and 55(i) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the Court below for an offence punishable under Sec. 8(2) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 5 witnesses as P.W.s 1 to 5 and got marked 4 documents as Exts. P1 to P4 and one material object as M.O.1.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the learned Addl. Sessions Judge, did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was, therefore, called upon to enter on his defence and to adduce any evidence which he might have in support there of. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 16-11-2006 found the appellant guilty of the offence charged against him and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine, to suffer simple imprisonment for one year more. It is the said judgment which is assailed in this appeal by the

accused.

6. I heard Advocate Sri. K.K.Rajeev, the learned counsel who defended the appellant on State Brief and Advocate Sri. K. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

8. P.W. 1 (M. Sreedharan Nair) was the Sub Inspector of Sooranadu Police Station who detected the offence. P.Ws 2 and 3 (Unnikrishna Pillai and Georgekutty) are the independent witnesses to the arrest of the accused, search and seizure of the contraband liquor. But both of them turned hostile to the prosecution. P.W.4 (Sathees Babu) was the Police Constable who accompanied P.W.1 while on patrol duty. P.W.5 (Gopinatha Pillai) was the Sub Inspector, Sooranadu Police Station who arrested the accused on 28-9-2003 in connection with some other crime namely Crime No. 29 of 2003 of the very same police station.

9. After hearing both sides and perusing the oral and documentary evidence in the case, I am not satisfied that the prosecution has succeeded in establishing the guilt of the appellant beyond reasonable doubt.

10. Both P.Ws 1 and 4 would say that while they reached Devagiri junction on patrol duty at about 4 p.m. on 1-9-2003 they got a credible information to the effect that Anandan of Anandhbhavan was vending illicit arrack. Accordingly, after parking the jeep at Devagiri junction when they proceeded on foot along the bank of the canal and reached near R.K. Bhavan a person standing on the bank of the canal was found pouring some liquor into a glass tumbler held by another person from out of a white jerry can and seeing the police party both the said persons after abandoning the can and glass tumbler made good their escape. P.Ws 1 and 4 claim to have seen the said persons from a distance of about 50 metres which will be more than 160 feet. Both of them do not have any previous acquaintance of those two persons . Going by their evidence they would have had only a fleeting glimpse of the two persons from a distance of more than 160 feet. This is hardly sufficient to subsequently identify those persons, particularly, when P.Ws 1 and 2 have no claim that they had noted any of the identifying features of those two persons. P.W.1 has confessed that he did not on that day arrest the accused standing in the dock and that none of the identifying features of the accused has been stated in Ext.P1 contemporaneous mahazar prepared by him from the spot itself. The following admission made by P.W..1 makes the position clear beyond doubt:-

"അവിടെ ഞാൻ ചെല്ലുംപോൾ ആരും ഉണ്ടായിരുന്നില്ല"

The same is the position with regard to P.W.4 as well. It is these two official witnesses who for the first time in Court after a lapse of more than three years identified the appellant as one of the two persons who fled from the scene. Much strain is not needed to conclude that the identification of the accused by these two witnesses cannot be accepted.

11. P.W5 is the Sub Inspector who arrested the accused after nearly 28 days of the alleged occurrence. He was arresting the appellant in connection with another case namely, Crime No. 29 of 2003. He had no knowledge about the fact that the accused was involved in the present crime. His testimony that after the arrest of the accused the witnesses had identified the appellant as the accused in this case cannot be believed for a moment. P.Ws 2 and 3 are the independent witnesses to the present detection and they did not support the prosecution . P.Ws 1 and 4 who are official witnesses could not have identified the appellant in the position in which they were on the date of occurrence. Hence, the dock identification of the accused by P.Ws 1 and 4 in the court for the first time and that too

after the lapse of three years of the detection, is absolutely valueless.

12. There is yet another reason that the prosecution cannot succeed in this case. P.W.1 claims to have drawn a sample of 180 ml. in a separate bottle from the spot itself and seized it under Ext.P1 mahazar after sealing the same on 1-9-2003. No doubt, Ext.P3 property list shows that on 2-9-2003 a sealed bottle containing 180 ml. a liquid, a white jerry can with 4.82 litres of contraband liquor and a glass tumbler were produced before the Magistrate and received as T.R. 378 of 2003 The prosecution relies on Ext.P4 certificate of chemical analysis to contend for the position that that the contents of the aforesaid sample bottle was found to contain 19.09 percent by volume of Ethyl Alcohol. But the prosecution has not produced any material before court below that a requisition or a forwarding was submitted before the Magistrate requesting the despatch of the sample bottle to the chemical examiner for analysis. No doubt, there an office copy of a forwarding note available in the records of the Magistrate. Going by the said forwarding note, on 2-9-2003 a request appears to have been made by the Sub Inspector

to despatch the sample bottle to the chemical examiner for analysis. Even assuming that the said unmarked document could be relied on, there is nothing to show that the sample bottle was forwarded in response to the said request. On the contrary, Ext.P4 certificate of chemical analysis refers to a letter dated 15-10-2003 from the Magistrate while forwarding a sample bottle to the chemical examiner for analysis. Apart from the fact that the office copy of the said covering letter from the Magistrate has not been marked in this case, no member of the thondi section of the Magistrate's court was examined to prove that the sample which was in fact forwarded along with the covering letter dated 15-10-2003 was the sample bottle received as per Ext.P3 property list. If as a matter of fact, a request was made on 2-9-2003 to forward the sample bottle to the chemical examiner, it is not known as to why a sample bottle was sent tot he chemical examiner only on 15-10-2003. Even assuming that the bottle which was forwarded to the chemical examiner as per the covering letter dated 15-10-2003 was the same bottle which was received under Ext.P3 property list, the prosecution will have to further prove that the said sample was drawn from the contraband liquor

possessed by the appellant. When the identity of the person who was allegedly possessing the contraband liquor has not been reliably proved by the prosecution, the appellant cannot be held liable for the possession of the contraband liquor. For this reason also, the prosecution has to fail. The conviction entered by the learned Addl. Sessions Judge overlooking the above vital aspect cannot therefore, be sustained and is accordingly, dislodged. The appellant is found not guilty of the offence punishable under Sec. 8 (2) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is found necessary in connection with any other case against him.

In the result, this Criminal Appeal is allowed as above.

V. RAMKUMAR
(JUDGE)

V. RAMKUMAR, J.

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Crl. Appeal No. 552 of 2007

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Dated, this the
5th day of June 2007

JUDGMENT